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RELEASES AND COVENANTS NOT TO SUE JOINT, OR JOINT AND SEVERAL DEBTORS.

THE subject of joint contracts is regarded as an elementary one in the law of contracts, yet its difficulties have received singularly little discussion either in treatises on the law of contracts or in essays. The fullest treatment of the matter is perhaps to be found in books on the law of partnership. But it is not always easy, where a partnership is concerned, to be sure how far peculiar rules of partnership may have affected the general principles of joint contracts.

No questions in regard to joint indebtedness are perhaps more troublesome than those suggested by the heading of this article. There are involved not only the rights of the creditor against the debtors, but also the rights of the debtors against each other, and not infrequently the cross rights which one of the debtors may acquire against the creditor by virtue of a covenant given by the latter. Further, law and equity have sometimes laid down rules at least apparently inconsistent in regard to the same question, thereby creating confusion; and in modern times statutes, sometimes sweeping and sometimes very partial in their operation, have repealed or qualified rules of the unwritten law. As none of the statutes in force in England or in this country purport wholly to change or to abolish the legal effects of the relationship between debtors which give rise to the questions involved in joint, and in joint and several indebtedness, the only practical way to consider

the law in any jurisdiction is first to get a clear conception of the rules of the unwritten law and then to consider the effect of such statutes as may have been passed.[1]

Effect of a release upon the creditor's rights.

It has been settled for centuries that a release of one joint debtor discharges all.[2] The reason for this rule is that a joint duty is one and indivisible. Therefore if A., B., and C. are jointly liable, any discharge of A., since it prevents thereafter a liability of A., B., and C. together and since that was the only liability which originally existed, destroys all liability. Another reason has often been given why the release of one joint debtor should discharge the others; namely, that the right of contribution of the other joint debtors against the one released would be thereby wrongfully discharged. This reason, however, is unsound because the rights of contribution between the several debtors depend on their relation to each other, or their agreements with each other. The creditor has no power to change either the relation or the agreements even with the coöperation of one of the debtors. A more refined and exact variation of this reason has been thus stated:

"The reason why a simple release of the principal debtor discharges the surety is, that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him." [3]

Doubtless there are equitable reasons why any binding agreement with a principal debtor will affect the rights of the creditor

[1] Professor Burdick, in a very useful and learned article in 11 Col. L. Rev. 101, has collected the statutes which provide for a joint and several liability in the case of partners and, in some jurisdictions, in the case of other joint debtors, but as will be seen from the present article the subject of joint and several liabilities is by no means free from all of the technicalities which exist in the case of purely joint liabilities.

[2] Co. Litt., vol. ii, 232 *a*; Lacy *v.* Kinaston, 1 Ld. Raym. 688; s. c. 12 Mod. 548 (1701); Clayton *v.* Kynaston, 2 Salk. 573 (1699); Lacy *v.* Kynaston, 2 Salk. 575 (1701); Dean *v.* Newhall, 8 T. R. 168 (1799); *Ex parte* Good, 5 Ch. D. 46, 57 (1876); Duck *v.* Mayeu, [1892] 2 Q. B. 511, 513; Johnson *v.* Collins, 20 Ala. 435 (1852). *Cf.* Carroll *v.* Corbitt, 57 Ala. 579 (1877); Clark *v.* Mallory, 185 Ill. 227, 56 N. E. 1099 (1900); Bonney *v.* Bonney, 29 Ia. 448 (1870); Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534 (1887); Merritt *v.* Buckman, 90 Me. 146, 37 Atl. 885 (1897); Yates *v.* Donaldson, 5 Md. 389 (1854); Munyan *v.* French, 60 N. J. L. 12, 36 Atl. 771 (1897); Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309 (1890).

[3] Mellish, L. J., in Nevill's Case, L. R. 6 Ch. 43, 47 (1870). See also Carroll *v.* Corbitt, 57 Ala. 579 (1877).

against a surety, and the explanation just quoted may partially explain the reason of this rule. But it is conceived that the rule relating to the release of one joint debtor does not depend on equitable principles or on the law of suretyship. Joint debtors as between themselves may be each liable primarily for a ratable share of the debt and as a surety for the remainder; or one may be primarily liable for the whole debt and the others may be merely sureties. But as a matter of pure common law it is believed that in every case alike, a release of one of the debtors, whether principal or surety, or partly principal and partly surety, discharges the others. Certainly the release of one joint co-surety is a legal discharge of the obligation of the other or others.[4] And an examination of the early cases discloses no inquiry or consideration of possible suretyship relations which the joint debtor released may have borne to his co-debtors.[5]

It is often said that nothing but a technical release under seal of a joint debtor discharges the obligation of the other joint debtors.[6] Such statements, however, necessarily involve the assumption that nothing but a release under seal can operate as a legal discharge of the original obligation. This assumption was true at common law if that obligation was a contract under seal for the payment of money, or was a contract under seal for the performance of any other act than the payment of money provided the time for performance had not yet come;[7] and it is in regard to such sealed instruments that the statement was originally applicable that nothing but a technical release under seal of a joint debtor would discharge the others.[8] At the present time when in most juris-

[4] Nicholson *v.* Revill, 4 A. & E. 675 (1836); Evans *v.* Bremridge, 2 Kay & J. 174, 183 (1855); Kearsley *v.* Cole, 16 M. & W. 128, 136 (1846); Price *v.* Barker, 4 E. & B. 760, 777 (1855); Ward *v.* Nat. Bank, 8 App. Cas. 755, 764 (1883); Mercantile Bank *v.* Taylor, [1893] A. C. 317; People *v.* Buster, 11 Cal. 215 (1858); Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679 (1885); Deering *v.* Moore, 86 Me. 181, 29 Atl. 968 (1893); Lower *v.* Buchanan Bank, 78 Mo. 67, 69 (1883).

[5] See citations *supra*, note 2.

[6] Hartley *v.* Manton, 5 Q. B. 247 (1843); *Ex parte* Good, 5 Ch. D. 46 (1876); Browning *v.* Grady, 10 Ala. 999 (1847); Evans *v.* Carey, 29 Ala. 99 (1856); McAllester *v.* Sprague, 34 Me. 296 (1852); Shaw *v.* Pratt, 22 Pick. (Mass.) 305 (1839); Gold Medal Sewing Machine Co. *v.* Harris, 124 Mass. 206 (1878); DeZeng *v.* Bailey, 9 Wend. (N. Y.) 336 (1832); Morgan *v.* Smith, 70 N. Y. 537, 543 (1877); Burke *v.* Noble, 48 Pa. St. 168 (1864).

[7] Wald's Pollock, Contracts, 3 ed., 835.

[8] See Webb *v.* Hewitt, 3 Kay & J. 438, 443 (1857).

dictions the effect of seals has been largely or wholly abolished by statute, and when even in other jurisdictions an accord and satisfaction may generally be pleaded at law as a bar to all kinds of sealed contracts,[9] it may be doubted whether many courts could fairly save the liability of a joint debtor even on a sealed contract where his co-debtor had been discharged by parol on sufficient consideration, though the sealed contract was for the payment of money, or the parol discharge was made before breach of the contract. However this may be, if a joint contract is not of the sort just alluded to, any agreement for good consideration with one of the joint debtors will operate everywhere, if so intended, as an immediate cancellation at law of his liability,[10] and therefore should have the same effect as a release under seal in discharging the other joint debtors. Undoubtedly a mere agreement to forbear or an unexecuted accord would not have this effect; but any legal bar against one joint debtor will operate as a bar against the others. This has been so held in regard to an accord and satisfaction;[11] and similarly where a statute provided that proof by a creditor under a general assignment should bar him from any subsequent action against the assignor, a creditor who proved his claim against one joint debtor who had made such an assignment was held thereby to discharge the other.[12]

Not only are all joint debtors discharged by a release of one of them, but the same rule is applicable to joint and several debtors. The joint as well as the several liability of all the debtors is discharged. This was early decided,[13] and the modern rule is the same.[14] It is less easy to find a technically satisfactory reason for the rule in case of joint and several debtors than in case of joint

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[9] Wald's Pollock, Contracts, 3 ed., 835.

[10] Wald's Pollock, Contracts, 3 ed., 828, 834.

[11] *In re* E. W. A., [1901] 2 K. B. 642.

[12] Munyan *v.* French, 60 N. J. L. 12, 36 Atl. 771 (1896).

[13] Cocke *v.* Jennor, Hob. 66, *pl.* 69 (1724); Hammon *v.* Roll, March 202 (1642); Windham's Case, 5 Coke 7 (1489). See also Co. Litt. 232 *a*. Clayton *v.* Kynaston, 2 Salk. 573, 574 (1699).

[14] *In re* E. W. A., [1901] 2 K. B. 642; United States *v.* Thompson, Gilp. (U. S.) 614 (1836); Garnett *v.* Macon, 2 Brock. (U. S.) 185, 220 (1825); Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818 (1891); Bonney *v.* Bonney, 29 Ia. 448 (1870); Bradford *v.* Prescott, 85 Me. 482, 486, 27 Atl. 461 (1893); American Bank *v.* Doolittle, 14 Pick. (Mass.) 123 (1833); Frink *v.* Green, 5 Barb. (N. Y.) 455 (1849); Crawford *v.* Roberts, 8 Or. 324 (1880).

debtors where there is no several obligation. The reason given in the early cases is that a release is as complete a satisfaction in law as performance. This reason seems somewhat artificial. To the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself. Perhaps the early conception of a release as a conveyance or grant of an indebtedness as if that were tangible property may explain why three or four centuries ago it might seem to have this effect.[15] It may be granted that a release of a joint and several debtor is properly to be construed as a release not only of his several liability but also of his joint liability. Even so, except on the supposition that the debt itself has been granted away, it is not easy to see why the several liability of the debtors not released should be extinguished. The correctness of the early rule, however, does not seem to have been seriously questioned.[16]

As the rule discharging all joint debtors, whether also severally liable or not, if one of them is released, is a technical rule which undoubtedly more often than not violates the intention of the parties to the release, it might be thought that equity would give relief from the application of the rule where it worked injustice and violated the intention of the parties. In support of such a contention might be cited the practice of courts of equity in giving relief in certain instances against the technical rule that a deceased joint debtor's estate is freed from liability to the creditor. Relief in such a case was originally based on a presumption that there had been a mistake of the parties in making a joint contract rather than a joint and several one. Such a presumption if made in every case, is, of course, based on a fiction and if consistently applied would lead to the result that a joint contract means one thing in equity and another at law. But equity has never professed to create a different substantive law of contracts from that established at law, and at the present time unless there is some ground in fact on which to base an allegation of mistake, English courts of equity at least seem to apply the same rules of survivorship in joint contracts as

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[15] See Professor Ames in 9 HARV. L. REV. 56; Wald's Pollock, Contracts, 3 ed., 358, n. 98.

[16] "It is too late now to question the law — that where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the others." *In re* E. W. A., [1901] 2 K. B. 642, 648.

do courts of law,[17] though the creditor's right to equitable relief finds some support in this country.[18] Whatever may be the rule in equity concerning survivorship, it is clear that English courts of equity, at least, do not now give, and never have given, relief from the effect of a release of one joint or joint and several debtor. Lord Hardwicke said: "There is no doubt but a release to one joint obligor is a release in equity to both as well as at law";[19] and very recently it has been held that an accord and satisfaction with one joint and several debtor precludes proof of the claim in bankruptcy against another,[20] though equitable rights have always been recognized in bankruptcy proceedings, and though the English Judicature Act adopts for all cases the rule of equity where that differs from the rule at law. This failure of equity to relieve from the effect of a release finds analogy in the failure of equity to relieve from the legal effect of a judgment against one or more joint debtors in merging the debt and thereby precluding any action against other debtors." [21]

Nevertheless, there can be no doubt that a more equitable result would have been reached if courts having equitable powers had assumed that a release of a joint or of a joint and several debtor, was intended by the parties as a release merely of the debtor to whom the release was given, and had given effect to that intention. Even upon such a construction the creditor's rights against the other co-debtors would not in every case have been reserved, for the question is affected not simply by the technical rule of the common law, but also by the rule which courts of equity have established for the protection of sureties that any discharge or binding agreement to forbear proceedings against a principal debtor discharges a surety since otherwise the burden which he had assumed might be increased or varied.[22]

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[17] See Griffith, Joint Rights and Liabilities, 47–55; Ames, Cases on Suretyship, 137, 138, n.; and as to partnership debts, Professor Burdick in 11 Col. L. Rev. 102–114. If the deceased debtor was a surety it has always been well settled that equity will give no relief against the rule of law and, therefore, the surety's debt is discharged. See Griffith, Joint Rights and Liabilities, *ubi supra*; Davis *v.* Van Buren, 72 N. Y. 587 (1878); Richardson *v.* Draper, 87 N. Y. 337 (1882), and cases therein cited.

[18] Ames, Cases on Suretyship, 138, n.

[19] Bower *v.* Swadlin, 1 Atk. 294 (1738).

[20] *In re* E. W. A., [1901] 2 K. B. 642.

[21] Kendall *v.* Hamilton, 4 App. Cas. 489 (1879).

[22] See Brandt, Suretyship, § 164, 376 *et seq.*

In the case of joint debtors, or of joint and several debtors, there is always some relation of principal and surety between the parties. One or more of the obligors may have entered into the obligation merely to accommodate one or more of the others. In such a case there is an uncomplicated relation of principal and surety. But even where all the debtors are interested in the debt, each is to some extent a principal debtor, but also each is acting as surety for the others to the extent that the equitable duty to pay belongs to them.[23] Accordingly a court of equity could not properly wholly relieve against the rule that a release of one co-debtor discharges the others, except where the debtor released was merely a surety. This result has been reached in a few decisions in the United States.[24] Where the joint debtors as between one another are liable equally or in other proportions for the debt, equity should not allow a release of one to relieve the others from liability except to the extent of the share of the debtor released. As to this share the other debtors were merely sureties. This result has been reached in several cases where the joint debtors were co-sureties.[25] No reason for a different rule is apparent where the joint debtors are principals, for such co-debtors like co-sureties are, as between one another, principals as to a portion of the debt and sureties as to the rest.[26] No decisions have been found, however, which apply the principle suggested upon this point, but it has been adopted by statute in some states.[27]

Effect of a covenant not to sue or a qualified release upon the creditor's rights.

A covenant not to sue a debtor or to forbear perpetually has from early times been held a bar to the original cause of action.[28]

[23] In the case of partnership obligations, if the partnership is regarded as an entity, the direct obligation would be that of the firm and the obligation of the individual partners would be as sureties for the firm.

[24] Carroll *v.* Corbitt, 57 Ala. 579 (1877); Schock *v.* Miller, 10 Pa. St. 401 (1849); Bridges *v.* Phillips, 17 Tex. 128 (1856); McIlhenny *v.* Blum, 68 Tex. 197, 4 S. W. 367 (1887). See also Burke *v.* Noble, 48 Pa. St. 168 (1864).

[25] Gordon *v.* Moore, 44 Ark. 349 (1884); Smith *v.* State, 46 Md. 617 (1877); State *v.* Matson, 44 Mo. 305 (1869); Massey *v.* Brown, 4 S. C. 85 (1872). See also Morgan *v.* Smith, 70 N. Y. 537 (1877). But see Draper *v.* Weld, 13 Gray (Mass.) 580 (1859) and cases cited *supra*, p. 205, n. 4.

[26] See *infra*, p. 214 and note 49.

[27] See *infra*, p. 221.

[28] Hodges *v.* Smith, Cro. Eliz. 623 (1598); Smith *v.* Mapleback, 1 T. R. 441, 446

This is to avoid circuity of action, for, if the plaintiff in the original action should recover, the defendant could recover precisely the same damages back for breach of the covenant not to sue or to forbear. Instead of permitting the double action, the court provides the same effect more simply by giving judgment for the defendant in the original action. But in case of a covenant not to sue one of several joint debtors, the intention of the parties can be attained only by enforcing in terms both the original promise and the later covenant. By so doing the obligee retains his right of action at law against all the joint debtors, becoming liable in turn to the one to whom the covenant not to sue or to forbear was given for any damage which the latter may suffer by the breach of covenant. If no part of the judgment obtained against the joint debtors is satisfied out of the property of the covenantee, such damages can only be nominal. Accordingly such a covenant given to one joint obligor does not have the effect of a release and the debt is not discharged.[29]

The same effect is given to a release which contains an express reservation of the obligee's rights against the other joint debtors.[30]

(1786); Ford *v.* Beech, 11 Q. B. 852 (1848); Flinn *v.* Carter, 59 Ala. 364 (1877); Jones *v.* Quinnipiack Bank, 29 Conn. 25 (1860); Guard *v.* Whiteside, 13 Ill. 7 (1851); Peddicord *v.* Hill, 4 T. B. Mon. (Ky.) 370 (1827); Foster *v.* Purdy, 5 Met. (Mass.) 442 (1843); Stebbins *v.* Niles, 25 Miss. 267 (1852); Line *v.* Nelson, 38 N. J. L. 358 (1876); Phelps *v.* Johnson, 8 Johns. (N. Y.) 54 (1811); Thurston *v.* James, 6 R. I. 103 (1859).

[29] Fitzgerald *v.* Trant, 11 Mod. 254 (1710); Lacy *v.* Kinnaston, Holt 178 (1701); S. C. 1 Ld. Raym. 688; S. C. 2 Salk. 575; S. C. 3 Salk. 298; S. C. 12 Mod. 548; Dean *v.* Newhall, 8 T. R. 168 (1799); Hutton *v.* Eyre, 6 Taunt. 289 (1815); Duck *v.* Mayeu, [1892] 2 Q. B. 511, 513; Garnett *v.* Macon, 2 Brock. (U. S.) 185, 220 (1825); Roberts *v.* Strang, 38 Ala. 566 (1863); Kendrick *v.* O'Neil, 48 Ga. 631 (1873); Haney & Campbell Mfg. Co. *v.* Adaza Creamery Co., 108 Ia. 313, 79 N. W. 79 (1899); Lane *v.* Owings, 3 Bibb (Ky.) 247 (1813); Mason *v.* Jouett's Admr., 2 Dana (Ky.) 107 (1834); McLellan *v.* Cumberland Bank, 24 Me. 566 (1845); Bradford *v.* Prescott, 85 Me. 482, 487, 27 Atl. 461 (1893); Shed *v.* Pierce, 17 Mass. 622 (1822); Durell *v.* Wendell, 8 N. H. 369 (1836); Benton *v.* Mullen, 61 N. H. 125 (1881); Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207 (1810); Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37 (1828); Bank of Chenango *v.* Osgood, 4 Wend. (N. Y.) 607 (1830); Couch *v.* Mills, 21 Wend. (N. Y.) 424 (1839).

[30] Solly *v.* Forbes, 2 B. & B. 38 (1820); Thompson *v.* Lack, 3 C. B. 540, 551 (1846); Price *v.* Barker, 4 E. & B. 760 (1855); Bateson *v.* Gosling, L. R. 7 C. P. 9 (1871); Green *v.* Wynn, L. R. 7 Eq. 28 (1868), L. R. 4 Ch. 204 (1869); Northern Ins. Co. *v.* Potter, 63 Cal. 157 (1883); Parmelee *v.* Lawrence, 44 Ill. 405 (1867); Dupee *v.* Blake, 148 Ill. 453, 35 N. E. 867 (1893); Gardner *v.* Baker, 25 Ia. 343 (1863); Bradford *v.* Prescott, 85 Me. 482, 486, 27 Atl. 461 (1893); Dickinson *v.* Bank, 130 Mass. 132

In fact such a release is in terms contradictory. If it is to be regarded as a true release of one joint debtor, it would be legally impossible to reserve rights against the others.[31] The whole debt would be discharged. In order to give effect to the manifest intention of the parties as nearly as possible, the courts have therefore held that a release with such a reservation is in legal effect no release at all, but merely a covenant not to sue.[32]

The same doctrine has been applied in any case where it appears from the terms of a release that it was not intended or expected that all the debtors should be released.[33] Parol evidence, however, showing an intent to reserve rights against other joint obligors has been held inadmissible.[34] But if the evidence is clear of a parol agreement with the released debtor that the creditor's remedies against the other debtors should be reserved, a bill in equity to reform the written release should be sustained.[35]

Effect of covenants and qualified releases where one joint debtor is a surety.

Though a covenant not to sue or a qualified release does not have the effect as such of discharging other debtors than the one to whom it was given, its effect must also be considered with reference to the equitable principle of suretyship previously alluded to.

An agreement to give time to a principal debtor, the surrender of collateral to him, or any other act or agreement with him which will increase or vary the risk of the surety, discharges the latter from liability.[36] Joint debtors as between one another may bear

(1881); Benton *v.* Mullen, 61 N. H. 125 (1885); Hubbell *v.* Carpenter, 5 N. Y. 171 (1851); Greenwald *v.* Kaster, 86 Pa. St. 45 (1878); Russell *v.* Adderton, 64 N. C. 417 (1870).

[31] See Nicholson *v.* Revill, 4 A. & E. 675 (1836); Kearsley *v.* Cole, 16 M. & W. 128 (1846); Webb *v.* Hewitt, 3 Kay & J. 438 (1857); Green *v.* Wynn, L. R. 4 Ch. 204 (1869).

[32] Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461 (1893).

[33] *Ex parte* Good, 5 Ch. D. 46, 55 (1876); Carroll *v.* Corbitt, 57 Ala. 579 (1877); Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461 (1893); Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534 (1888); Burke *v.* Noble, 48 Pa. St. 168 (1864).

[34] Mercantile Bank *v.* Taylor, [1893] A. C. 317; Clark *v.* Mallory, 185 Ill. 227, 56 N. E. 1099 (1900); Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534 (1888). But see *contra*, Massey *v.* Brown, 4 S. C. 85 (1872).

[35] Bank of Montreal *v.* McFaul, 17 Grant Ch. (U. C.) 234.

[36] Brandt, Suretyship, § 376 *et seq.*

the relation of principal debtor and surety for the whole debt, or they may be bound as between one another to bear the debt in equal proportions or in any other proportions.

In so far then as a creditor chooses to give time and even more clearly in so far as he chooses to covenant never to sue a joint debtor who is the principal debtor, he will be unable thereafter to charge a surety for the same debt. But the principle which discharges the surety is an equitable one and is subject to equitable modifications. If a surety consents to a discharge or change of liability of the principal debtor, he cannot claim exemption from liability.[37] It has also been established that the surety cannot claim exemption if the agreement with the principal debtor reserves in effect to the surety all rights of indemnification to which he is entitled, and this is the legal effect of an agreement which reserves to the creditor a right against the surety, as well as of an agreement which in terms reserves the surety's rights against the principal debtor.[38] The rule which permits a creditor to make a covenant not to sue or to release a principal debtor known to be such and nevertheless by a reservation of the creditor's rights against co-debtors, still hold them bound, though they are sureties and known to be such, is in reality inconsistent in principle with the rule that an agreement with the principal debtor to forbear or to give time discharges the surety. This latter rule must rest on the injustice of holding a surety bound when the creditor has varied the terms of the obligation. The injustice is no less because the creditor when he varies the obligation agrees with the principal debtor but without the consent of the surety that the surety shall not be discharged. If it be urged that where the right against the surety is reserved, his right of indemnity against the principal is also reserved, and that therefore the surety is not injured, the reply is obvious that the surety's right of indemnity can never be taken away from

[37] Brandt, Suretyship, § 379 *et seq.*; Ames, Cases on Suretyship, 150, n.

[38] Bateson *v.* Gosling, L. R. 7 C. P. 9 (1871); Mueller *v.* Dobschuetz, 89 Ill. 176, 182 (1878): "An agreement which preserves the right of the creditor to proceed against the surety, or the right of the surety to proceed against the principal, will not discharge the surety," citing Rucker *v.* Robinson, 38 Mo. 154 (1866); Morse *v.* Huntington, 40 Vt. 488, 496 (1868); Price *v.* Barker, 4 E. & B. 760 (1855); Kearsley *v.* Cole, 16 M. & W. 128 (1846); Viele *v.* Hoag, 24 Vt. 46 (1851); Hubbell *v.* Carpenter, 5 N. Y. 171 (1851). Numerous other cases to the same effect might be cited in which the principal and surety were severally but not jointly bound. This can involve no distinction in principle. See Ames, Cases on Suretyship, 150, n.

him in any case without his consent, and that therefore, if the continued existence of the right of indemnity justifies the creditor in changing the terms of his contract with the principal, no agreement to give time to the principal should discharge the surety. The fact will always remain that after a covenant with the principal debtor whether or not there is an express reservation of rights against the surety, not only the surety's right of subrogation if he chooses or is compelled to pay the debt is injuriously affected, but also the chance which he is called upon to face is different after the covenant has been made than it was before. After such a covenant the creditor's rights against the principal debtor are different from what they were previously, and that such a change is unjust to the surety is the only reasonable basis for ever holding him discharged by the giving of time.

Though it is not possible to reconcile the general rule forbidding the giving of time with the special rule permitting it without the surety's consent if the creditor's right against the surety is expressly reserved, at least it is possible to show how the inconsistency arose. The general rule forbidding the giving of time is a modern one in equity.[39] Its recognition at law is still more modern.[40] About a century before such a doctrine was heard of even in equity, it had been laid down that a covenant not to sue one joint debtor did not discharge the others.[41] Before the adoption by courts of law of the rule protecting sureties from agreements between creditor and principal debtor for forbearance a case had presented the question of the effect of a release of one joint debtor with a reservation of rights against another.[42] The court purported merely to

[39] "The doctrine that an agreement to give time to the principal discharges the surety in equity seems to be a comparatively modern notion. The editor has not discovered any earlier instances of the application of the doctrine than Lord Thurlow's decision in 1789, in the case of Nisbet *v.* Smith, 2 Bro. C. C. 579, which was followed by Rees *v.* Berrington (1795), 2 Ves. Jr. 540; Boultbee *v.* Stubbs (1810), 18 Ves. 20; Bowmaker *v.* Moore (1816), 3 Price, 214; Eyre *v.* Bartrop (1818), 3 Mad. 221. In all of the cases just cited the surety was a specialty obligor." Ames, Cases on Suretyship, 156, n.

[40] In Dean *v.* Newhall, 8 T. R. 168 (1799), and Hutton *v.* Eyre, 6 Taunt. 289 (1815), covenants to discharge a joint debtor known to be the principal debtor were held not to bar the creditor from proceeding against the other joint debtors, though they were sureties, and the covenants contained no reservation of rights against the latter.

[41] Lacy *v.* Kinnaston, Holt 178 (1701); s. c. 1 Ld. Raym. 688; s. c. 12 Mod. 548; s. c. 2 Salk. 575; s. c. 3 Salk. 298; Fitzgerald *v.* Trant, 11 Mod. 254 (1710).

[42] Solly *v.* Forbes, 2 B. & B. 38 (1820).

construe a release in terms contradictory and held it to amount in effect to a covenant not to sue one joint debtor, and, therefore, under well-recognized law to have no effect on the liability of his co-debtor. The doctrine of this case persisted and was even applied to cases where the joint debtor against whom rights were reserved was a surety, while side by side with this doctrine there flourished the newly arisen doctrine discharging sureties if time was given to the principal debtor. Lord Eldon was thought to recognize the right of the creditor in equity to reserve his rights against the surety.[43] Baron Parke added the weight of his authority,[44] and the matter must now be considered settled,[45] however unsatisfactory may be the attempts to reconcile two conflicting doctrines.

As a creditor may release one joint debtor and expressly reserve rights against the other, so in the case of joint and several obligations, a creditor may release the several liability of one or more of the debtors with a reservation of the joint right.[46] And the joint liability may be released with a reservation of the several right.[47]

Importance of the creditor's knowledge of a suretyship relation between joint debtors.

Another principle also besides the form of the covenant or release qualifies the right to be discharged of a joint debtor who in fact is a surety. A creditor who has received the joint obligation of several persons, unless he has actual knowledge of their relation to one another, cannot be justly required to regard the obligation as anything less or different from what it appears to be. On the face of a joint obligation the apparent liability of each obligor is for an *aliquot* part of the whole debt as a principal debtor, and as a surety of the remaining co-obligors for the rest of the debt. As there can be no question of the discharge of one joint debtor by a covenant not to sue another except in so far as the former is a surety, it follows that a creditor of several joint obligors who is ignorant of any special relation of principal and

[43] *Ex parte* Gifford, 6 Ves. 805 (1802); Boultbee *v.* Stubbs, 18 Ves. 20 (1810).

[44] Kearsley *v.* Cole, 16 M. & W. 128 (1846).

[45] See cases cited *supra*, p. 212, n. 38.

[46] Thompson *v.* Lack, 3 C. B. 540, 549 (1846).

[47] North *v.* Wakefield, 13 Q. B. 536 (1849); Stevens *v.* Stevens, 5 Exch. 306 (1850).

surety between them may reasonably assume that their liability to each other is to pay the debt in equal shares; and an agreement by him to give time, or never to sue, made with one of the joint debtors could not have the effect of discharging the others to a greater extent than from all liability for the payment of the proportionate share of the one debtor with whom the agreement was made. But in fact the law seems to be that a covenant not to sue one of several joint principal debtors does not effect a discharge of the others even to this extent. Though it is sufficiently obvious upon principle that joint debtors who are under equal obligations as between one another to pay the debt are principals for a ratable share, and sureties as to the remainder, and though such joint debtors are recognized to be sureties for one another as to a ratable proportion of the debt in any litigation between them for contribution,[48] the rule forbidding the creditor to give time to a principal debtor is held inapplicable in such cases. Thus it is said

"where two or more execute a note for a joint liability they are in some respects sureties for each other, but the principle upon which a surety in the proper sense of the term is exonerated from liability by a contract with the principal, giving date of payment without the assent of the surety, has never been applied in such a case." [49]

The same point is involved also in decisions which lay down broadly that a covenant not to sue a joint debtor who in fact is in part a principal does not discharge the others, though their liability beyond their ratable shares is that of sureties, even though there is no express reservation of the creditor's rights against them.[50]

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[48] See Clark *v.* Dane, 128 Ala. 122, 28 So. 960 (1900).

[49] Neel *v.* Harding, 2 Met. (Ky.) 247, 250 (1859), quoted and followed in Mullendore *v.* Wertz, 75 Ind. 431 (1881). To the same effect is Parsons *v.* Harrold, 46 W. Va. 122, 124, 32 S. E. 1002 (1899). See also Draper *v.* Weld, 13 Gray (Mass.) 580 (1859).

[50] The other obligors were held still bound, though the question of suretyship was not discussed, in Roberts *v.* Strang, 38 Ala. 566 (1863); Kendrick *v.* O'Neil, 48 Ga. 631 (1873); Mason *v.* Jouett's Admr., 2 Dana (Ky.) 107 (1834); McLellan *v.* Cumberland Bank, 24 Me. 566 (1845); Bradford *v.* Prescott, 85 Me. 482, 487 (1893); Shed *v.* Pierce, 17 Mass. 622, 628 (1822); Durell *v.* Wendell, 8 N. H. 369 (1836). See also First Nat. Bank *v.* Cheney, 114 Ala. 536, 21 So. 1002 (1896). In Dean *v.* Newhall, 8 T. R. 168 (1799); Hutton *v.* Eyre, 6 Taunt. 289 (1815), and Ward *v.* Johnson, 6 Munf. (Va.) 6 (1817), the joint creditor who received a covenant that he should not be sued was a principal debtor, and there also it was held that the other joint obligors were not discharged. The question of suretyship was referred to only in

The doctrine protecting sureties, however, is held applicable to cases where one joint debtor is merely a surety for the whole debt. Though in early cases the parol evidence rule was thought to prevent the proof of such a relation between the parties unless stated in the instrument creating the obligation, at first in equity and now generally at law, if the creditor at the time when he received the obligation knew that one of the joint debtors was as between himself and his co-obligors primarily liable for the whole debt, the creditor will lose his rights against all the joint obligors if he makes any agreement or commits any action with reference to the debtor primarily liable which would impair the rights or increase the risk of those who were sureties.[51]

A more difficult question arises where the creditor did not know when he received the joint obligation that the obligors bore the relation of principal and surety to each other, and, subsequently, but before covenanting with the principal debtor, received this information. In some decisions it has been held an infringement of the rights for which the creditor bargained to compel him to recognize the relation between the debtors; and under these de-

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the case last cited, in which it was suggested that in equity the surety might be entitled to discharge. Such would now be the surety's recognized right both at law and in equity.

[51] Scott *v.* Scruggs, 60 Fed. 721 (1894); Branch Bank, etc. *v.* James, 9 Ala. 949 (1846); Lehnert *v.* Lewey, 142 Ala. 149, 37 So. 921 (1904); Vestal *v.* Knight, 54 Ark. 97, 15 S. W. 17 (1891); Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685 (1898); Stewart *v.* Parker, 55 Ga. 656 (1876); Trustees of Schools *v.* Southard, 31 Ill. App. 359 (1889); Sample *v.* Cochran, 84 Ind. 594 (1882); Lambert *v.* Shitler, 62 Ia. 72, 17 N. W. 187 (1883); S. C. 71 Ia. 463, 32 N. W. 424 (1887); Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63 (1896); Neel *v.* Harding, 2 Met. (Ky.) 247 (1859); Jones *v.* Fleming, 15 La. Ann. 522 (1860); Cummings *v.* Little, 45 Me. 183 (1858); Guild *v.* Butler, 122 Mass. 498 (1877); Barron *v.* Cady, 40 Mich. 259 (1879); Smith *v.* Clopton, 48 Miss. 66 (1873); O'Howell *v.* Kirk, 41 Mo. App. 523 (1890); Lee *v.* Brugmann, 37 Neb. 232, 55 N. W. 1053 (1893); Rochester Savings Bank *v.* Chick, 64 N. H. 410, 13 Atl. 872 (1887); Hubbard *v.* Gurney, 64 N. Y. 457 (1876); Welfare *v.* Thompson, 83 N. C. 276 (1880); McComb *v.* Kittridge, 14 Oh. 348 (1846); Diffenbacher's Estate, 31 Pa. Super. Ct. 35 (1906); Turrill *v.* Boynton, 23 Vt. 142 (1851); Glenn *v.* Morgan, 23 W. Va. 467 (1884); Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621 (1881). But the law of California is otherwise. The creditor may treat a joint obligor as a principal debtor though knowing him to be a surety. California, etc. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38 (1895). And see Moriarty *v.* Bagnetto, 110 La. 598, 34 So. 701 (1903). In Yates *v.* Donaldson, 5 Md. 389 (1854), and in Anthony *v.* Fritts, 45 N. J. L. 1 (1883), the defense was held inadmissible at law, although it was suggested that equity would give relief. See Brandt, Suretyship, § 38. See further Professor Crawford D. Hening, in 59 Univ. Pa. L. Rev. 532.

cisions he still may treat each debtor as if he were liable as a principal for an *aliquot* part of the whole debt.[52] But by the great weight of authority, even in the situation supposed, the creditor is required to recognize the equitable rights of the surety and therefore loses his own right against all the debtors if after learning of the relation of the obligors to each other he makes such an agreement or so acts with reference to a joint debtor who is, in fact, the principal obligor, as to impair the rights of a co-debtor who is a surety.[53]

The principles of suretyship under consideration depend merely on the existence of the relation of principal debtor and surety between persons liable for the same debt. Whether they are liable jointly, jointly or severally, or merely severally, is not material. It is, therefore, pertinent to consider in this connection authorities relating to principal and surety bound severally; and it may be added, therefore, that in the situation supposed the English courts and the Supreme Court of the United States have held that knowledge acquired by the creditor at any time prior to the indulgence given to the principal, excuses the surety.[54]

It seems very possible, however, that the Uniform Negotiable Instruments Act, which now has been passed in most of the United

[52] Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685 (1898); Gano *v.* Heath, 36 Mich. 441 (1877); Heath *v.* Derry Bank, 44 N. H. 174 (1862); Diffenbacher's Estate, 31 Pa. Super. Ct. 35 (1906). See also Hoge *v.* Lansing, 35 N. Y. 136 (1866); Delaware County Trust Co. *v.* Haser, 199 Pa. St. 17, 48 Atl. 694 (1901); Farmers, etc. Bank *v.* Rathbone, 26 Vt. 19 (1853).

[53] Scott *v.* Scruggs, 60 Fed. 721 (C. C. A.) (1894); Branch Bank *v.* James, 9 Ala. 949 (1846); Stewart *v.* Parker, 55 Ga. 656 (1876); Lauman *v.* Nichols, 15 Ia. 161 (1863); Neel *v.* Harding, 2 Met. (Ky.) 247 (1859); Fuller *v.* Quesnel, 63 Minn. 302, 65 N. W. 634 (1895); Smith *v.* Clopton, 48 Miss. 66 (1873); O'Howell *v.* Kirk, 41 Mo. App. 523 (1890); Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002 (1899). See also Ewin *v.* Lancaster, 6 B. & S. 571 (1865); Wheat *v.* Kendall, 6 N. H. 504 (1834); Westervelt *v.* Frech, 33 N. J. Eq. 451 (1881); Shelton *v.* Hurd, 7 R. I. 403 (1863); Zapalac *v.* Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938 (1900).

[54] Union Mutual Life Ins. Co. *v.* Hanford, 143 U. S. 187, 191, 12 Sup. Ct. 437 (1892). Mr. Justice Gray said: "The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract; Ewin *v.* Lancaster, 6 B. & S. 571; Oriental Financial Corporation *v.* Overend, L. R. 7 Ch. 142, and L. R. 7 H. L. 348; Wheat *v.* Kendall, 6 N. H. 504; Guild *v.* Butler, 127 Mass. 386; or even if that relation has been created since that time. Oakeley *v.* Pasheller, 4 Cl. & Fin. 207, 233; S. C. 10 Bligh N. S. 548, 590; Colgrove *v.* Tallman, 67 N. Y. 95; Smith *v.* Sheldon, 35 Mich. 42." Quoted with approval in Scott *v.* Scruggs, 60 Fed. 721, 725 (C. C. A.) (1894).

States, reverses, so far as negotiable instruments are concerned, the rule of suretyship generally established, and permits a creditor to covenant not to sue or to forbear proceeding against one of several persons jointly liable on the instrument, though the covenantee is the principal debtor and known to be such, and the creditor's rights against the surety are not in terms reserved.[55]

Whether consideration received from one joint debtor must be credited in proceedings against another.

If it be assumed that an agreement made by a creditor with a joint, or a joint and several debtor, does not discharge the remaining debtors, either on the technical principles of the common law governing joint debtors, or on the principles of suretyship, it may still be asked are these remaining debtors entitled to credit for the consideration paid by the debtor who received a covenant or qualified release, or are they liable for the whole debt without deduction? The answer to this question seems to depend on the terms of the agreement made by the creditor. If A. and B. are jointly liable to C. for $100, C. may covenant not to sue A. in consideration of the payment of $25 on the debt, or in consideration of the payment of a separate and additional sum of $25; just as a creditor may agree to forbear suing an individual debtor in consideration of the payment of part of the debt or in consideration of an additional sum.[56] But in the absence of clear evidence of a contrary intention, where a creditor covenants not simply for temporary forbearance, but permanently never to sue one of several debtors, it should be presumed that the payment made by that debtor in consideration for the covenant is a payment on account of the debt, and therefore to that extent the debt is discharged as to all the debtors.[57]

[55] This was so held in Vanderford *v.* Farmers' Bank, 105 Md. 164, 66 Atl. 47 (1907); Bradley Engineering Co. *v.* Heyburn, 56 Wash. 628, 106 Pac. 170 (1910); Cellers *v.* Meachem, 49 Or. 186, 89 Pac. 426 (1907); Wolstenholme *v.* Smith, 34 Utah 300, 97 Pac. 329 (1908); Richards *v.* Market Exch. Bank Co., 81 Oh. St. 348, 90 N. E. 1000 (1910). But see *contra*, Fullerton Lumber Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50 (1908); Farmers' Bank *v.* Wickliffe, 134 Ky. 627, 121 S. W. 498 (1909); Fritts *v.* Kirchdorfer, 136 Ky. 643, 124 S. W. 882 (1910). See the discussion of this matter by Professor Crawford D. Hening in 59 Univ. Pa. L. Rev. 532.

[56] See Langdell, Summary of Contracts, § 54, p. 70.

[57] See Carroll *v.* Corbitt, 57 Ala. 579 (1877). This is expressly so provided in many of the statutes referred to below.

Rights of a joint debtor who has received a covenant that he shall not be sued, or a qualified release.

The effect of a covenant not to sue one of several joint debtors or of a release of one with a reservation of rights against the others has been considered from the aspect of the creditor. The same question may be considered from the aspect of the debtor who has received the covenant or release; and it may be premised that if the undischarged joint debtors are forced by any means without their consent to pay more than their share of the joint debt, they can in turn enforce a claim for contribution against the debtor or debtors who received the covenant or qualified release.[58] What then are the rights of a joint debtor discharged by the creditor, but thus forced to contribute by a co-debtor? The answer would seem to depend upon the construction of the covenant or release which he has received from his creditor. It seems possible for a creditor to covenant with a joint debtor that not only shall the covenantee be free from direct liability to the creditor, but also that he shall not be made indirectly liable by being forced to contribute on account of payments made by the other joint debtors. If such is the true meaning of a creditor's covenant, the covenantee when forced to contribute by the other debtors would have an action at law against the covenantor to recover the amount of his contribution, and in order to avoid circuity of action the covenantee would be entitled to relief in equity as well as at law for the substantial enforcement of the covenant:

"The intention of the parties is carried out by allowing the creditor to take payment [judgment?] at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected, not only from paying more directly, but if *there be sureties*, by restraining the creditor from collecting any amount out of them, because that would subject him [the covenantee] to their action, and thus indirectly violate the covenant, or if there be other principal obligors, by restraining the collection of any more than an *aliquot* part of the debt, or any amount that would subject the party [covenantee] to an action for contribution."[59]

[58] Hutton *v.* Eyre, 6 Taunt. 289 (1815); Price *v.* Barker, 4 E. & B. 760, 780 (1855).

[59] Russell *v.* Adderton, 64 N. C. 417 (1870). Quoted with approval in Craven *v.* Freeman, 82 N. C. 361, 365 (1880). See also Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242, 253 (1822), where Chancellor Kent construed a covenant not to sue one joint

But this is not the necessary construction of a covenant not to sue. It is questionable whether such a covenant can be extended by implication to mean that the covenantee shall not be sued by anyone on account of the debt.[60] Certainly, if the creditor by his covenant or release expressly reserves his right against the other joint debtors, the agreement must then necessarily be construed as binding the creditor to refrain only from direct proceedings against the debtor who receives the covenant or release, but not to hold that debtor harmless from such liability as may come to him indirectly after the debt has been enforced against other joint debtors. As has been seen, even though the debtor receiving the covenant or release is known to be the principal debtor, a right may be reserved against the other joint debtors though known to be merely sureties.[61] And the enforcement by the sureties of their right to indemnification against their principal will give the latter no right against the creditor,

"for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for, he was a party to the agreement by which that right was reserved to the creditor and the question whether or not the surety is informed of the arrangement is wholly immaterial."[62]

But even where the creditor expressly reserves a right against other co-debtors than the one released, and therefore may in a circuitous manner compel the one released to pay a portion of the debt, by rendering him liable to a suit for contribution, or indemnity, it seems the creditor would be liable for breach of covenant if

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obligor as amounting in effect to an agreement to discharge that obligor and also to discharge a surety from liability for his debt.

[60] The implication was held not permissible in Mallet *v.* Thompson, 5 Esp. 178 (1804); and this conclusion seems necessarily involved in any unqualified statement that a covenant not to sue one joint debtor does not discharge the others, for if such a covenant were construed as meaning that the covenantee should be sued by no one, to avoid circuity of action the covenantor in some cases at least ought not to be allowed to sue the others. See *supra*, p. 215, n. 50.

[61] Bateson *v.* Gosling, L. R. 7 C. P. 9 (1871). And see cases cited *supra*, p. 212, n. 38.

[62] Bateson *v.* Gosling, L. R. 7 C. P. 9, 15 (1871). To the same effect are Nevill's Case, L. R. 6 Ch. 43, 47 (1870); Parmelee *v.* Lawrence, 44 Ill. 405, 411 (1867).

he himself should levy execution directly on the debtor to whom he had given a release.[63]

Statutes.

The principles which have been set forth above, as established by the common law, still remain unaltered by statute in the majority of the states. In a number of states, however, it has been provided that a creditor may release or make a compromise with one joint debtor without discharging others.[64] The effect of such statutes seems to be to make a release of a joint debtor, in substance equivalent to a covenant not to sue or to a release with reservation of rights at common law. The most important question under such statutes is how far the rights of sureties are affected. In many of the statutes it is expressly provided that the right of contribution against other joint debtors shall not be affected. In some statutes it is expressly provided that when a joint debtor released is a principal debtor, or when a debtor not released is a mere surety, the statute is inapplicable.[65] Under such statutes the rule that a surety is discharged by the discharge of the principal debtor, without the surety's consent and without reservation of rights, apparently remains in force.[66]

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[63] In Solly *v.* Forbes, 2 B. & B. 38 (1820), the action was brought against joint debtors Forbes and Ellerman; the latter had been given by the creditors a release with a proviso reserving all rights against Forbes. The counsel for the defendant urged that this release discharged the claim altogether, but the counsel for the plaintiff argued (at page 45): "The present suit is quite consistent with the provisoes, for Ellerman is sued jointly with Forbes on a joint debt; Ellerman is only joined for conformity, and if he or his property be taken in execution, he has his remedy by an action for damages on this deed, taking it as a covenant not to sue." To this part of the argument the Court in its opinion said: "It is not necessary now to say anything as to any ulterior remedy the defendant may have or suppose himself to have: — In this respect he will act as he may be advised, and as circumstances may seem to require."

[64] Cal. Civ. Code (1906), § 1543; Colo. Rev. Stat. (1908), §§ 3605, 3606; Conn. Gen. Stat. (1902), § 655; Minn. Rev. Laws (1905), § 4283; Mo. Rev. Stat. (1909), § 2777; Mont. Rev. Code (1907), §§ 7135, 7136; Nev. Comp. Laws (1900), §§ 2739, 2741; N. Y. Debtor & Creditor Law, § 230, Birdseye's Cumming & Gilbert's Consol. Laws (1909); Ohio Gen. Code (1910), §§ 8079–8084; R. I. Gen. Laws (1909) (like Ohio); S. C. Civ. Code (1902), §§ 2841–2843; Utah Comp. Laws (1907), §§ 2037, 2038; Vt. Pub. Stat. (1906), §§ 1528, 1529; Va. Code (1904), §§ 2856, 2857; Wis. Stat. (1898), §§ 4204, 4205.

[65] See statutes cited *supra* of California, Minnesota, Utah, Vermont, Wisconsin.

[66] See Harrier *v.* Bassford, 145 Cal. 529, 538 (1904).

The same construction would doubtless be adopted in the absence of express provisions in the other states under consideration.[67]

In the statutes of a few states the suretyship relation between joint debtors, each of whom is primarily liable for a share of the debt, is recognized; and acceptance of the consequences of the relation is indicated by provisions that a release of one joint debtor entitles the others to credit on the debt of the full portion which the released debtor was previously bound to pay.[68]

In a few of these states, however, the mistake seems to have been made of assuming that when joint debtors are each primarily bound to pay a share of the debt, they are necessarily bound each to pay an equal share, for it is provided that a release of a joint debtor entitles the others to credit on the debt of an equal share thereof according to the number of debtors.[69] It is obvious that the credit should be for the amount for which the debtor released was primarily liable, whether that was a ratable portion or not, unless a larger sum had in fact been paid by the debtor released. In the latter event the credit should be for the full amount paid.

In Utah and Wisconsin it is provided that the statutory permission to release one joint debtor shall not be so applied as to permit a principal to be released without the discharge of sureties.[70] This provision perhaps has the effect of making it impossible for a creditor to release a joint debtor who is a principal and still preserve even by express reservation his rights against sureties.

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[67] State *v.* Matson, 44 Mo. 305, 308 (1869); Lower *v.* Buchanan Bank, 78 Mo. 67, 69 (1883).

[68] See statutes cited *supra* of Colorado, Minnesota, Montana, Nevada, Vermont and Virginia. So it was held in Lower *v.* Buchanan Bank, 78 Mo. 67, 69 (1883), and in Morgan *v.* Smith, 70 N. Y. 537 (1877), that the common-law rule that the release of one jointly bound surety discharges his co-sureties was abrogated by the state statute; but that unreleased co-sureties were thereafter liable only for the balance remaining after deducting the discharged surety's share.

[69] See statutes cited *supra* of Minnesota, Nevada and Vermont.

[70] See statutes cited *supra* of Utah and Wisconsin.